IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3086 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHINTAN ENTERPRISES PVT LTD

Versus

RB SHUKLA OR HIS SUCCESSOR IN OFFICE

Appearance:

1. Special Civil Application No. 3086 of 2000

MR MIHIR JOSHI for MR SN SOPARKAR for Petitioner No. 1

MR BB NAIK for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 17/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This petition under Article 226 of the Constitution is directed against the order dated 29.9.1999 (Annexure "A") passed by the Commissioner of

Income-tax, Surat in so far as the revision application filed by the petitioner under Section 264 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") is only partly allowed and not wholly allowed and also against the order dated 31.1.2000 (Annexure "B") passed by the said officer rejecting the petitioner's application under Section 154 of the Act for review of the earlier order.

2. The petitioner is a Private Company. For the assessment year 1996-97, the return of income was filed showing Nil income claiming refund of the TDS to the tune of Rs.2,59,403/-. This is with reference to the contract receipts of Rs.1,12,82,271/-, although it was short shown by a sum of Rs.4,00,638/- which was conceded in the revision petition as its income rightly computed by the Assessing Officer. The assessment was made under Section 144 on the total income of Rs.1,43,44,310/-. This included a sum of Rs.1,38,20,346/- on account of unsecured loans which were not explained within the purview of Section 68 of the Act.

3. The revision petition was filed against the said order objecting to the aforesaid addition apart from the assessment under Section 144 of the Act. The case was fixed for hearing on 10.8.1999 which was adjourned to 23.8.1999. However, it was partly heard at the request of the Director of the assessee-Company and his counsel on 10.8.1999 in which they were asked to give confirmations of the creditors and other details. The Deputy Commissioner of Income-tax, Company Circle 3(1), Surat was asked to submit his report on the various papers given by the petitioner. The case was adjourned to 30.8.1999. It was further adjourned. Finally, the hearing took place on 29.9.1999 when Mr Vijay Shah, Director of the Company and Mr Hiren Vepari, Chartered Accountant appeared.

After hearing the parties, the Commissioner came to the conclusion that the entire credit balance of Rs.1,39,20,345/- was not required to be taken into consideration for the relevant assessment year which is 1996-97, but only the fresh credits of Rs.65,10,839/= alone are required to be considered and the balance relating to the earlier years cannot be considered for additions during the relevant year. As regards the confirmation of various credits, the Commissioner held, inter alia, as under :-

"As regards the credits of private Companies the

confirmations are not in favour of the assessee and the major creditor, Aram Apartment P.Ltd. has not given any confirmation. The contention that accounts of creditor Companies are audited does not sound well since no such evidence was given to me or to Assessing Officer. In view of this fact, there is no discharge of onus that lies on the assessee u/s.68 of the I.T. Act. The credits to the tune of Rs.59,55,551/- are rightly added and there is no case to interfere in the addition. In other words, the addition of Rs.59,55,551/- out of total addition of Rs.1,39,20,345/- as unexplained credits is confirmed. There would be a relief of Rs.79,64,794/-."

(emphasis supplied)

As regards the credits of non-corporate assessees, the Commissioner held as under :-

"The credits of non-corporate assessees already assessed to tax may not justify the addition in the case of the assessee in the light of the confirmations given and the fact that they are assessed to tax. The Assessing Officer making assessment of such creditors may look into the matter in their personal cases."

The Commissioner further rejected the petitioner's contention that repayments are to be allowed set off against new credits in the same accounts during the year.

4. At the hearing of this petition, Mr Mihir Joshi, learned counsel for the petitioner has submitted that the preponement of the hearing by the Commissioner had caused tremendous prejudice to the petitioner, as its Chartered Accountant Mr RN Vepari could not remain present. Mr Joshi has also submitted that the findings given by the Commissioner that confirmations are not given in favour of the assessee and that major creditor Aram Apartment P.Ltd. has not given any confirmation are contrary to the material on record.

The learned counsel has also challenged the doubt raised by the Assessing Officer as to why loan confirmations are in favour of M/s Chintan Builders P.Ltd. whereas the assessee is M/s Chintan Enterprises P.Ltd. Reliance is placed on the fresh certificate of

incorporation issued by the Registrar of Companies on 28.4.1994 consequent on change of name of the assessee from "M/s Chintan Builders Pvt.Ltd." to "M/s Chintan Enterprises Pvt.Ltd.".

Mr Joshi has also relied on the letters written by the petitioner to the Commissioner of Income-tax, Surat - the revisional authority, giving detailed explanations in the matter and including the letter dated 27.9.1999 addressed by petitioner's Chartered Accountant Mr RN Vepari to the Deputy Commissioner of Income-tax, Surat referring to the material produced including the audited balance sheets of the corporate lenders and the chart giving in abridged form the new loans which have been received and loans repaid. Reference is also made to the letter dated 20.9.1999 of the Deputy Commissioner stating that the assessee has filed various unsecured loan confirmations. It is, therefore, submitted that the findings are given contrary to the record.

Further grievance is made that the report of the Deputy Commissioner referred to in paras 3 and 7 of the impugned order was not given to the petitioner and, therefore, there was violation of principles of natural justice.

The learned counsel lastly contended that the Commissioner erred in law in ignoring the repayments and in rejecting the petitioner's contention that repayments are to be allowed set off against new credits in the same accounts during the year.

5. On the other hand, Mr BB Naik, learned standing counsel for the revenue has opposed the petition and relied on the affidavit in reply of the respondent-revisional authority. It is submitted that preponement of the hearing did not cause any prejudice to the petitioner as the petitioner's Director alongwith Chartered Accountant Mr Hiren Vepari appeared before the Commissioner on 29.9.1999 and neither the Director nor Mr Hiren Vepari sought any adjournment.

On merits also, Mr Naik has opposed the petition and supported the order of the Commissioner.

6. Having heard the learned counsel for the parties, it appears to us that when the Deputy Commissioner had raised a specific query in his letter dated 20.9.1999 (Annexure "E") to clarify the relations between M/s Chintan Enterprises P.Ltd., Surat and M/s Chintan Builders P.Ltd., Surat and also to explain the

discrepancy as to why in the books of unsecured lenders the payment has been shown to M/s Chintan Builders P.Ltd. and the petitioner had produced the fresh certificate of incorporation issued by the Registrar of Companies consequent on change of the petitioner's name from M/s Chintan Builders P.Ltd. to M/s Chintan Enterprises P.Ltd. (certificate dated 28.4.1994 at Annexure "C") and the above position was explained by the petitioner in para 4 of its letter dated 27.9.1999 (Annexure "F"), it was incumbent upon the Deputy Commissioner of Income-tax to note the said change and also to state the relevant fact in his report. Because a copy of the report was not supplied to the petitioner, it appears to us that the petitioner did not even get an opportunity to point out that the Deputy Commissioner had not taken this fact into account. Similarly, the aforesaid letter dated 27.9.1999 of the petitioner to the Deputy Commissioner pointed out that audited balance sheets of the corporate lenders were given and still the Commissioner in his impugned order has stated as under :-

> "The contention that the accounts of creditor Companies are audited does not sound well since no such evidence was given to me or to Assessing Officer."

7. Finally coming to the contention about repayments made by the assessee during the year not considered by the revisional authority, it appears to us that when the controversy is about verification of the fact whether the unsecured loans in favour of the assessee were explained or not within the meaning of Section 68 of the Act, the revisional authority was required to look into the entire account between the parties and not merely the figures of credit. However, since the matter is required to be looked into by the revisional authority all over again, we do not propose to make any further observations.

8. In view of the above discussion, the impugned orders dated 29.9.1999 and 31.1.2000 (Annexure "A" and "B" respectively) passed by the Commissioner of Income-tax, Surat are hereby quashed and set aside and the matter is remanded back to the Commissioner of Income-tax, Surat for rehearing the revision petition under Section 264 of the Income-tax Act, 1961. The Commissioner shall give a reasonable opportunity of personal hearing to the petitioner to explain all the material produced before him and also to produce any further material if the petitioner desires to do so in order to explain the doubts raised by the Commissioner in the impugned order. The report of the Deputy

Commissioner, Company Circle 3(1), Surat referred to in paras 3 and 7 of the impugned order of the Commissioner and relied upon by the Commissioner shall also be furnished to the petitioner within ten days from the date of receipt of the writ of this Court so that the petitioner can thereafter submit its further material to meet with the doubts, if any, raised by the Deputy Commissioner in the said report and also to meet with the doubts raised in the Commissioner's order.

9. Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

sundar/-